NO. 47785-8-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

U.S. BANK NATIONAL ASSOCIATION as Trustee for Structured Asset Mortgage Investments II Inc. Bear Stearns ALT-A Trust, Mortgage Pass-Through Certificates, Series 2006-3,

Plaintiff/Appellant,

v.

NORTH AMERICAN TITLE COMPANY; CV JOINT VENTURES, LLC; STEVEN SHELLEY AND JANE DOE SHELLEY; THE UNITED STATES OF AMERICA; and JOHN AND JANE DOES, I THROUGH V, OCCUPANTS OF THE SUBJECT REAL PROPERTY, and ALL OTHER PERSONS OR PARTIES UNKNOWN, CLAIMING ANY RIGHT, TITLE, INTEREST, LIEN OR ESTATE IN THE PROPERTY HEREIN DESCRIBED,

Defendants/CV Joint Ventures.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

At the center of this case lies an unusable house that spans two parcels of real property. Both U.S. Bank and CV Joint Ventures claim to own the house. U.S. Bank brought this case in order to establish its rights as the true owner of the entire U.S. Bank House. This is precisely the type of situation for which quiet title is appropriate. Ironically, if CV Joint Ventures wants to use the U.S. Bank House, it will need a judicial determination of the parties' respective ownership rights—the very thing it seeks to avoid. Because of the uncertainty surrounding the parties' respective rights, the U.S. Bank House has been vacant and unusable by either party for years. Should the Court dismiss the case, the U.S. Bank House will remain unusable by both parties and will continue to sit vacant as both a private and public liability.

CV Joint Ventures' repeated shouting of the words "tax deed" does not help or settle the matter. Its tax deed arose from a tax foreclosure sale for a parcel of "unimproved vacant land," but the land was not unimproved or vacant. A large portion of the U.S. Bank House lies thereon. Importantly, all relevant parties intended that the entire U.S. Bank House be encumbered by the U.S. Bank Deed of Trust. More importantly, U.S. Bank paid taxes for the entire U.S. Bank House—they were not deficient. No assessor has authority to seize or convey property

for which taxes have been paid. All authority is in agreement on this—including that cited by CV Joint Ventures. Moreover, in *Smith v. Henley*, 53 Wn.2d 71, 330 P.2d 712 (1958) ("*Smith*") the Washington Supreme Court applied this fundamental rule to circumstances such as here, where taxes were paid for improvements actually located on another parcel that was sold to a third party at a tax foreclosure sale.[1] Accordingly, U.S. Bank respectfully requests that the Court reverse the superior court's CR 12(b)(6) dismissal of U.S. Bank's complaint against CV Joint Ventures and related orders as set forth in the Brief of Appellant.

II. COUNTERSTATEMENT OF RELEVANT FACTS

CV Joint Ventures transposed two dates on page 4 of its brief. U.S. Bank filed its complaint on April 21, 2015 (not April 24), and pleaded that it learned of the issue involving the house spanning two lots on April 24, 2012 (not April 21). CP 1; CP 6, ¶ 24.

III. ARGUMENT

A. U.S. Bank's Claim for Quiet Title is Valid

1. Quiet Title is Needed

Should the Court affirm the dismissal of CV Joint Ventures, the uncertainty surrounding the parties' respective ownership of the U.S. Bank

[1] *Berry v. Pond*, 33 Wn.2d 560, 206 P.2d 506 (1949) ("*Berry*"), is similarly instructive in that the Supreme Court permitted a party who had title to a sixty-foot strip by adverse possession, and who had improvements located on that strip, and who believed that he was paying taxes thereon, to prevail over a party who had acquired a tax title thereto.

House will remain unresolved. CV Joint Ventures repeatedly states that the case should be dismissed because the parties "own exactly what they own." Resp't Br. 1, 47; CP 36. What "exactly" the parties own, however, is entirely unclear. Apparently, CV Joint Ventures refers to the real property described in the deeds respectively held by the parties and the portion of the U.S. Bank House located thereon. CV Joint Ventures claims that it owns part of the U.S. Bank House, and U.S. Bank owns the other part, split only by the boundary line between Parcel B and Parcel C. Resp't Br. 1. This was never the intention of any relevant party and even brief consideration reveals that this idea is replete with serious problems.

Following this reasoning, neither party can use the U.S. Bank House for fear of trespass and/or liability. Neither party can effectively demolish their own portion of the U.S. Bank House without trespassing on the neighboring parcel and/or causing damage to the neighbor's portion. Neither party can demolish the portion of the U.S. Bank House lying on the other's property. It is not clear who is responsible for taxes, insurance, and utilities, or how any of these should be apportioned. Utilities for the portion of the U.S. Bank House lying on one parcel are likely supplied by lines running through the other parcel without an easement or other agreement governing their use. Neither Parcel is marketable because of the uncertainty over ownership and due to the likelihood of ensuing

lawsuits.[2] Consequently, both Parcel B and Parcel C (including the U.S. Bank House) have sat vacant for years.

Without judicial intervention, the U.S. Bank House will continue to sit vacant as a liability both to the parties and the community. Resolution of this stalemate and the resultant efficient use of the U.S. Bank House serve the public interest. For these reasons U.S. Bank brought its quiet title action, and for these same reasons the Court should reverse the trial court's dismissal of U.S. Bank's claims.[3]

2. Quiet Title is Proper

CV Joint Ventures goes to great lengths to factually distinguish the cases cited by U.S. Bank for the simple proposition that quiet title is commonly used in cases to challenge (often successfully) the ownership rights of parties holding tax deeds. Resp't Br. 11-13 (citing *Morrison v. Berlin,* 37 Wash. 600, 79 P. 1114 (1905); *Dolan v. Jones*, 37 Wash. 176, 79 P. 640 (1905); *Morcom v. Brunner*, 30 Wn. App. 532, 635 P.2d 778 (1981)). Such distinctions are completely unnecessary since U.S. Bank's

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[2] CV Joint Ventures states that "Nowhere [in] the Complaint has the Bank alleged it could not sell Parcel B." Resp't Br. 10. U.S. Bank directs CV Joint Ventures to page 7 of the Complaint which states "U.S. Bank and CV Joint Ventures each own parcels with clouds on title because the dwelling spans across both lots," and page 8 of the Complaint which states "U.S. Bank is the owner of only Parcel B, which does not include the whole dwelling and is not marketable." CP 7, ¶ 25; CP 8 ¶ 31.

[3] CV Joint Ventures disparages U.S. Bank's claim as an attempt to "bail out" the title company. This is misleading and untrue. U.S. bank seeks to resolve the numerous issues involved with the subject property and establish its rightful ownership of the U.S. Bank House.

only point in citing these cases is that quiet title is commonly used in cases to challenge the ownership rights of parties holding tax deeds.

Numerous other cases support this proposition. *See* G.J.C., Annotation, *Tax title as affected by fact that tax had been paid before sale,* 26 A.L.R. 622 (2016) ("The general rule is to the effect that one who had in fact paid his taxes upon property prior to a sale thereof for delinquency may maintain an equitable action to set aside and cancel the void sale and deed as a cloud on his title.") (collecting thirty-four cases on this point from multiple jurisdictions, including *Loving v. Maltbie*, 64 Wash. 336, 116 P. 1086 (1911); *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 109 P. 327 (1910); *Taylor v. Debritz*, 48 Wash. 373, 93 P. 528 (1908); *Loving v. McPhail*, 48 Wash. 113, 92 P. 944 (1907); *Smith v. Jansen*, 43 Wash. 6, 85 P. 672 (1906)). CV Joint Ventures tries to factually distinguish these cases as well, when the point is that they all recognize that quiet title is the correct cause of action to resolve situations comprising competing claims of ownership involving tax deeds.

3. The Court Has Authority to Act in Equity

Washington courts can, and should, exercise their equitable authority over this dispute. Resolution of property rights is one of the oldest and most recognized areas of jurisprudence. CV Joint Ventures argument that "[t]here is nothing to quiet or partition" and that "this case

does not present a justiciable controversy" is absurd, and, when taken to its logical conclusion invites anarchy. Resp't Br. 1 & 3. If the courts cannot intercede in this matter, how does CV Joint Ventures propose that the parties resolve their disagreement over their respective property rights, a duel? No,"[t]he courts retain all the equitable powers inherent in them, and may still exercise them when the occasion demands it." *O'Brien v. Johnson*, 32 Wn.2d 404, 202 P.2d 248 (1949) (holding statutory remedy afforded taxpayer is not "exclusive" in the sense that legislature has deprived courts of any of their constitutional equity powers; and courts retain such powers and may still exercise them when occasion demands it.). This occasion demands it.

4. A Claim for Quiet Title Does Not Require Illegal Conduct

CV Joint Ventures oddly repeatedly states that the court should hold in its favor because its actions are not illegal. Resp't Br. 1, 3; CP 29, 30. It should be obvious that this case does not involve allegations of illegality. It is not clear whether CV Joint Ventures does not understand that illegality is not required for a quiet title claim, or if this is a deliberate straw man tactic. Either way, such non sequitur should be ignored.

5. A Claim for Quiet Title Does Not Need to be Pleaded with an Accompanying Legal Theory.

Because a quiet title action is an equitable claim for relief, damages are ordinarily not allowed, unless the action is coupled with

another legal cause of action, such as ejectment, unlawful detainer, or slander of title. *Kobza v. Tripp*, 105 Wn. App. 90, 95-96, 18 P.3d 621, 624 (2001) (citations omitted). This is why legal theories are often coupled with quiet title. *Id.* Such coupling however, is not necessary when only an equitable remedy is sought. *See id.* (explaining the same and reversing trial court's award of special damages because no legal theory was pleaded in conjunction with claim for quiet title, but leaving equitable relief intact).

U.S. Bank has not alleged damages against CV Joint Ventures, and accordingly, it is not required to plead a legal theory in conjunction with its claim for quiet title. CV Joint Ventures' repeatedly asserts that U.S. Bank's pleadings are insufficient because U.S. Bank has not coupled a legal theory with its quiet title claim. Resp't Br. 2, 47; CP 29, 33. This is not only misleading, it is contrary to Washington law.

B. A Tax Sale Cannot Convey Property for Which Taxes were Paid

As thoroughly briefed in the Brief of Appellant, a tax deed has no validity "*where the tax has been paid*".[4] RCW 84.64.180. This case is

[4] CV Joint Ventures appears to suggest that U.S. Bank can only seek a refund for its overpayment of taxes per RCW 84.68.070. Resp't Br. 14-17. However, like in the numerous cases cited in the Brief of Appellant which involve parties successfully challenging tax deeds, U.S. Bank seeks to quiet title to the property at issue because seeking a refund would not resolve the underlying issue of who owns the house. Further, CV Joint Ventures appears to agree that "RCW 84.68.070 does allow actions under . . . . [t]he three exceptions to the finality of a tax deed [including] (1) taxes paid; (2) property

very similar to *Smith v. Henley*, which involved a plaintiff seeking to quiet title to a house located entirely on a parcel of real property he bought at a tax sale. 53 Wn.2d at 73. Like here, the assessor in *Smith*, had previously assessed the house as an improvement to a neighboring parcel, and the defendants and their predecessors who owned the neighboring parcel had paid the taxes assessed against their own parcel, including those assessed against the house. *Id.* at 72. The plaintiff in *Smith* (like CV Joint Ventures) contended that any interest the defendants had in the house was cut off by the tax deed he obtained at the tax sale. *Id.* at 73. *Smith* rejected the plaintiff's argument, holding that the **tax deed could not convey or include the house because the taxes had been paid on the house** by the defendants, stating:

> By the express reservation contained in RCW 84.64.180, it was made manifest that it was not the intent of the legislature to subject land on which taxes have been paid to foreclosure.... It is true that the mistake was that of the defendants their predecessors as well as the assessor, but it was an honest mistake, based on a reasonable assumption, and....it is not the policy of the law that the owner should lose his land through excusable mistake.

Id. at 75-76 (citations omitted). This is strikingly similar to the present situation. In an apparent attempt to avoid *Smith*, CV Joint Ventures focuses on non-issues and oddly embraces arguments that *Smith*

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exempt from tax; [and] (3) frustration of taxpayer in payment of this taxes by public official." Resp't Br. 15 (citing *Berry*, 33 Wn.2d at 567). U.S. Bank brings its appeal under the first and third of these exceptions.

explicitly rejected, including those involving segregation, possession, and taxes.

1. Smith v. Henly Rejected CV Joint Ventures' Segregation Argument

This case does not involve segregation, nor does it need to. CV Joint Ventures incorrectly states that U.S. Bank "claims to have paid taxes on the house by improperly segregating real property from the improvements" and apparently claims that segregation is necessary to find the tax deed invalid as to the house and land lying thereunder. Resp't Br. 1. U.S. Bank has not claimed that segregation occurred, only (like in *Smith)* that it paid the taxes on the entire house as assessed by the Assessor. It seems that CV Joint Ventures should make the segregation argument, as the plaintiff in *Smith*, who in addition to claiming to own the entire house located on "his property" claimed that the house could have been assessed to the tax paying party as a severed improvement, and thus he owned the land thereunder. 53 Wn.2d at 74. *Smith* rejected this argument, noting that the governing statute only allows segregation where buildings, structures, or improvements are held in separate ownership from the fee, of which there had never been any claim. *Id.* at 74. It accordingly found that the defendants must have paid taxes on the land under the house as well, assuming the Assessor followed statutory

assessment requirements, which includes that land must be assessed with improvements per RCW 84.40.030. *Id.*

Like the Defendants in *Smith*, U.S. Bank paid taxes on the house at issue and thus, like *Smith*, the Assessor could neither transfer the house nor the land thereunder to CV Joint Ventures.

2. *Smith v. Henly's Holding Was Based on Taxes Paid, Not Possession.*

Smith held that "it was made manifest that it was not the intent of the legislature to subject land *on which taxes have been paid to foreclosure, or* to deprive one in possession of the right to set up his payment as a defense to an action to oust him." *Id.* at 75 (emphasis added). CV Joint Ventures misleadingly emphasizes the second half of this quote, ignores the conjunction "or," and states that U.S. Bank has not been in possession. Resp't Br. 38. *Smith*, however, did not analyze possession, and instead focused exclusively on whether taxes had been paid on the house. *See Label v. Cleasby*, 13 Wn. App. 789, 793, 537 P.2d 859, 862 (1975) ("Our State Supreme Court indicated in both *Berry* and *Smith* that its decision in each case rested upon its conclusion that the taxes on the disputed property in question had been paid in fact.").[5]

[5] CV Joint Ventures also grasps at the fact that there was "confusion" in the assessor's office in *Smith*, and states there was "no confusion of records alleged in the present case." Resp't Br. 38. U.S. Bank pleaded that (1) Parcel C has been at all relevant times taxed as unimproved, vacant land by the Pierce County Assessor's Office; (2) CV Joint Ventures

3. *Smith v. Henly Only Required Evidence of Payment of Taxes on the House at Issue, Not on the Entire Parcel it was Located On.*

Over and over again, CV Joint Ventures points to its tax deed and conclusively states that U.S. Bank only paid taxes assessed against Parcel B, not Parcel C. Resp't Br. 13, 14, 23, 24, 34, 38, 40, 41. This argument was raised by *Smith's* dissent, and rejected by the Court. 53 Wn.2d at 81 (Hill, C. J., dissenting) (noting that the only evidence presented to overcome the prima facie presumption that taxes on the west half of the tract had not been paid created by plaintiff's tax deed was the fact that defendants had paid taxes on the house which was located thereon). CV Joint Ventures ignores this and repeats that U.S. Bank has not paid taxes assessed against Parcel C. As *Smith* held, however, it is not the payment of taxes on the entire Parcel C that matters, it is the payment of taxes by U.S. Bank assessed against the portion of the U.S. Bank House located thereon.[6]

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purchased Parcel C at a tax sale; (3) a rather large portion of the house at issue lies on Parcel C; and (4) U.S. Bank has paid taxes on the house. CP 6, ¶¶ 20, 21, 22; CP 7, ¶25. This more than supports an inference of confusion, error and/or mistake at the assessor's office.

[6] CV Joint Ventures also appears to argue that the Assessor intentionally assessed the entire house to Parcel B, going so far as to say "nothing in the assessment statute requires surveys to ascertain the exact location of such structures . . . . there is no authority or facts presented to show that assessing the structure to one of two parcels previously in common ownership was in error." Resp't Br. 36-38. Not only is this illogical on its face, it directly contradicts CV Joint Ventures' position that it owns the improvements on Parcel C because the tax deed it holds describes the land on which a portion of the house lies and "the presumption at law is that the real estate includes the improvements permanently affixed thereto." More troubling is that CV Joint Ventures' position flatly

C. The Statutes of Limitations Do Not Bar U.S. Bank's Claims

As discussed in depth in the Brief of Appellant, U.S. Bank's claims are not barred by the three-year statute of limitations set forth in RCW 4.16.090 for three reasons: (1) quiet title actions are not subject to any statute of limitations; (2) U.S. Bank paid taxes on the U.S. Bank House; and (3) CV Joint Ventures does not possess the U.S. Bank House.

CV Joint Ventures appears to concede the first two of these bases as it does not address them in its brief. Rather, CV Joint Ventures devotes several pages to attacking the third basis, cherry picking law to support its position.

CV Joint Ventures recognizes the judicially created exception proffered in *Kupka v. Reid*, 50 Wn.2d 465, 312 P.2d 1056 (1957), whereby possession by the tax deed purchaser is required in order for the purchaser to invoke the three-year statute of limitations. Resp't Br. 41-42. CV Joint Ventures also embraces the exception to *Kupka* proffered in *Fitzgerald v. Neves, Inc.*, 15 Wn. App. 421, 426, 550 P.2d 52, 55 (1976), noting that "it makes sense" that actual possession by the purchaser under a tax deed as a prerequisite to invoking the bar of RCW 4.16.090 is limited to those cases

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contradicts its own cited authority, RCW 84.04.090, which states "The term 'real property' for the purposes of taxation shall be held and construed to mean and include the land itself, whether laid out in town lots or otherwise, and all buildings, structures or improvements or other fixtures of whatsoever kind thereon . . . ." Clearly the Assessor erred by assessing the entire house to Parcel B, and assessing Parcel C as vacant unimproved land.

in which the original owner remained in possession. Resp't Br. 42. That however, is where CV Joint Ventures stops.

CV Joint Ventures rejects *Morcom v. Bruner*, 30 Wn. App. 532, 535, 635 P.2d 778, 780 (1981), which states that *Fitzgerald's* requirement for the original owner to remain in possession "applies only where the property in dispute is 'wild and unimproved' and there is no party in possession." CV Joint Ventures states that this exception to the exception "makes little sense"—apparently determining which appellate court decisions should apply based on CV Joint Ventures' determination of whether they "make sense" to CV Joint Ventures. Resp't Br. 42.

Admittedly, the courts do not appear to have directly considered a situation in which neither party is in possession of a house spanning two parcels of property. U.S. Bank believes that in such circumstance the Supreme Court's holding in *Kupka* should apply. However, this is a moot argument since the other two uncontested bases for the inapplicability of the statute of limitations in this case remain, namely: (1) quiet title actions are not subject to any statute of limitations; and (2) U.S. Bank paid taxes on the U.S. Bank House.

D. Ignoring U.S. Bank's Payment of Taxes on the House Would Result in a Denial of Due Process

In *Sallee v. Bugge Canning Co.*, the Washington Supreme Court

examined thirty-three cases in which the three-year statute of limitations set forth in the precursor to RCW 4.16.090 had been cited, and stated that:

> in applying [the statute], we have assumed, as a basis for its scope, the existence of certain fundamental prerequisites with reference to the tax and the tax foreclosure proceeding on which any challenged tax deed rests, such as . . . **the taxes for which the lien was foreclosed were actually unpaid** and delinquent . . . . The foregoing is . . . merely a statement of some, but not necessarily all, of those essentials to the validity of a tax and a tax foreclosure that we ordinarily assume to exist without discussion. **Those essentials are for the most part so self-evident that any argument that [the statute], or any statute of limitation, bars a consideration of their absence in an attack on a tax deed dependent thereon is an absurdity, a denial of constitutional restrictions on the taxing power, or a denial of due process of law.**

38 Wn.2d 737, 744, 232 P.2d 81, 85 (1951). CV Joint Ventures naively dismisses *Sallee* for its age and being "based on superseded statutes," (Resp't Br. 40-41.) while ignoring the fact that the statute in *Sallee* was the precursor to RCW 4.16.090, and has identical operative language.[7] *Sallee* involved a challenge to a tax foreclosure proceeding held in 1918—over thirty years prior to the case. While the fundamental prerequisite in *Sallee* (the land was not subject to tax) differed from that here (taxes were paid), *Sallee* states that any such fundamental prerequisites "cannot be

[7] CV Joint Ventures states that the operative language from RCW 4.16.090 is that it requires actions to set aside a tax deed to be "brought within three years from and after the date of issuance of such treasurer's deed." Resp't Br. 39. The statute in *Sallee*, Rem. Rev. Stat. § 162, states "Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed . . . ."

obviated by a statute of limitations," since to do so "deprive owners of their property without due process of law." *Id.* at 744. As set forth in the Brief of Appellant, the notion of taxes being paid as a fundamental prerequisite to a tax deed's validity is firmly supported by all Washington Authority.

E. Reformation is Available

1. The Court Can Reform The Tax Deed

CV Joint Ventures' argument that its tax deed "is not susceptible to equitable reformation" Resp't Br. 3 is fundamentally flawed and based on misstated authority. CV Joint Ventures repeatedly boldly proclaims that "equity will not interfere to reform a tax deed," Resp't Br. 22, 25, 28 quoting *Kennedy v. Anderson*, but ignores the preceding language in *Kennedy* that states: "**depending for its validity on strict compliance with the requirements of the statutes in respect to all the prior proceedings**". 88 Wash. 457, 460, 153 P. 319, 321 (1915) (emphasis added). Strict compliance with RCW 84.64.180 mandates that the tax assessor cannot convey property for which taxes have been paid.

CV Joint Ventures quotes *Label v. Cleasby*, for the proposition that U.S. Bank as the taxpayer "must be deemed to bear the risk of a faulty legal description contained in his deed," (Resp't Br. 24) but omits key immediately preceding language, which states

> Our State Supreme Court indicated in both *Berry* and *Smith* that its decision in each case rested upon its conclusion **that the taxes on the disputed property in question had been paid in fact.** Therefore, both cases are distinguishable from this case because of the trial court's finding of fact No. 6 which states in part that 'the taxes on the disputed property were not paid by anyone.' This finding is undisputed, and there is no contention that the property was not liable to the tax. Thus, this case does not fall within either of the statutory exceptions to the priority of a tax title. RCW 84.64.180. Moreover, it is undisputed that there was no error on the part of a public official which prevented the payment of taxes and, accordingly, this case does not fall within the recognized 'third exception.'

13 Wn. App. at 793 (emphasis added). CV Joint Ventures quotes multiple cases recognizing the superiority of a tax deed over adverse possession and easements by prescription—subjects which are not at issue in this case. Resp't Br. 20-21, 26 (citing *Palin v. Sherman*, 38 Wn.2d 806, 807, 232 P.2d 105, 106 (1951) (adverse possession); *Rushton v. Borden*, 29 Wn.2d 831, 839, 190 P.2d 101, 105 (1948) (adverse possession); *Hanson v. Carr*, 66 Wash. 81, 84, 118 P. 927, 928 (1911) (easement by prescription); *Gustaveson v. Dwyer*, 78 Wash. 336, 341, 139 P. 194, 196 (1914) *on reh'g,* 83 Wash. 303, 145 P. 458 (1915) (adverse possession))[8] Further, CV Joint Ventures even rejects authority involving adverse possession when it dislikes the holding. Resp't Br. 24 (rejecting *Berry*, 33 Wn.2d 560, as an adverse possession case and for its basis on a proper

[8] CV Joint Ventures confusingly claims that a tax deed extinguishes an adverse possession claim Resp't Br. 20, 24, 26, while at the same time claiming that U.S. Bank's pleading is deficient because it did not bring an adverse possession claim. *Id.* at 2, 47.

statutory challenge to a tax deed in that the tax was paid—the latter being the precise reason U.S. Bank has cited it).

Authority unanimously recognizes that a tax assessor may not seize or sell property for which taxes had been paid, so CV Joint Ventures' tax deed holds no sway over the Court's equitable authority.

2. CV Joint Ventures is Not an Innocent Third Party

The terms "innocent purchaser," "good faith purchaser," and "bona fide purchaser" are interchangeable as they relate to the ability to raise an "innocent third party" defense against reformation. *See* Tellier, L.S., *Pleading bona fide purchase of real property as defense*, 33 A.L.R.2d 1322 (2016) ("The terms 'bona fide purchaser,' 'purchaser in good faith,' and 'innocent purchaser,' while perhaps having slightly different technical meanings, are used more or less interchangeably by the courts as meaning one who purchases without notice or knowledge, or means of knowledge sufficient to charge him with knowledge, of a prior interest, and, usually, for a valuable consideration . . . ."); *see also Thorsteinson v. Waters*, 65 Wn.2d 739, 745-46, 399 P.2d 510, 513 (1965) (noting reformation is subject to "innocent third parties" not being adversely affected thereby, and engaging in "bona fide purchaser" analysis) *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984); *Dennis v. N. Pac. Ry. Co.*, 20 Wash. 320, 333-34, 55 P. 210, 215 (1898)

(affirming reformation of deed and noting that appellants "cannot set up a claim of innocent purchasers" since they were at least "on inquiry [notice]").

CV Joint Ventures spends pages arguing that, as a purchaser at a tax auction, it is not required to be "innocent" a "bona fide purchaser" or act in "good faith." Resp't Br. 28-32. Yet CV Joint Ventures confusingly concludes by appearing to claim that it is an innocent third party, and that "as no one yet has identified, let alone alleged, that CV did anything wrong so as to not be innocent." That is incorrect. U.S. Bank pleaded that (1) Parcel C has been at all relevant times taxed as unimproved, vacant land by the Assessor; (2) CV Joint Ventures purchased Parcel C at a tax sale; and (3) a rather large portion of the house at issue lies on Parcel C. CP 6, ¶¶ 20, 21; CP 7, ¶ 25. The question of CV Joint Ventures' "innocence" with respect to a defense against reformation is governed by whether it had (1) "knowledge or information of facts which are sufficient to put an ordinarily prudent [person] upon inquiry" and (2) "the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question." *Levien v. Fiala*, 79 Wn. App. 294, 298–299, 902 P.2d 170 (1995) (quoting *Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074, 1077 (1984)). Simply looking at the property would have revealed

that not only was it not unimproved vacant land, but that the U.S. Bank House extended over the boundary onto the adjacent parcel, which was not the subject of the tax sale.[9] *See Schultz v. Plate*, 48 Wn. App. 312, 317, 739 P.2d 95 (1987) ("A purchaser/grantee 'may not now be heard to say that [he] failed to see that which was plainly visible and which could have been ascertained upon inquiry.'" quoting *Atwell v. Olson*, 30 Wn.2d 179, 184, 190 P.2d 783 (1948)). And any reasonable person would know that a lender would intend to secure its loan against an entire house as opposed to part of a house. *See e.g. Glepco, LLC v. Reinstra*, 175 Wn. App. 545, 562, 307 P.3d 744, 750 (2013) ("*Glepco*") ("[W]e can discern no logical reason whatsoever, nor is any offered, as to why GMAC would have agreed to eliminate the valuable part of the security with the house on it."). Moreover, as addressed in the Brief of Appellant, it is improperly premature to resolve the issue of whether CV Joint Ventures was a bona fide purchaser on a CR 12(b)(6) motion.

3. U.S. Bank and CV Joint Ventures Do Not Need to be Parties to the Same Agreement for the Court to Act in Equity and Reform the Operative Deeds.

It does not matter that U.S. Bank and CV Joint Ventures are not parties to an agreement with each other. To the extent that U.S. Bank

[9] CV Joint Ventures also tries to shift the bona fide purchaser standard onto U.S. Bank. Resp't Br. 30. However, it is CV Joint Ventures who raised the issue as a defense to U.S. Bank's reformation claim, and accordingly it is CV Joint Ventures' knowledge which is relevant to its ability to maintain that defense.

seeks to reform its own deed of trust, *Glepco* rejected a similar contention that trustee sale buyers could not seek reformation because they were not a party to the original deed of trust. *Glepco,* 175 Wn. App. at 558 ("We disagree. 'Standing to assert a claim in equity resides in the party entitled to equitable relief; it is not dependent on the legal relationship of those parties.'" quoting *Smith v. Monson*, 157 Wn. App. 443, 445, 236 P.3d 991 (2010)).[10]

To the extent that such action requires reformation of CV Joint Ventures' tax deed,[11] CV Joint Ventures is a third party, but, as explained above and in the Brief of Appellant, is not an innocent third party because it was on inquiry notice of the existence of the house. Moreover, CV Joint Ventures took a gamble by purchasing unimproved vacant land at a tax sale, and it assumed the risk that the rather large portion of the house located on the parcel it purchased belongs to U.S. Bank. *Pierce Cnty. v.*

[10] U.S. Bank does not believe that the Assessor is a necessary party as the Court can independently reform the operative deeds. Should the Court determine that the Assessor is a necessary party, U.S. Bank will gladly amend its Complaint to name the Assessor.

[11] As noted in the Brief of Appellant, U.S. Bank requested reformation in its complaint as a seemingly less drastic remedy than cancelling the tax deed held by CV Joint Ventures, but U.S. Bank is happy to accept the same as part of equitable relief ultimately granted. U.S. Bank does not believe that it needs to plead this separately and it appears CV Joint Ventures agrees. Resp't Br. 18 (citing *Eagles v. Gen. Elec. Co.*, 5 Wn.2d 20, 27, 104 P.2d 912, 915 (1940) (It is true that they have not used the specific words 'set aside or cancel' either in their allegations or in their prayer for relief, but they pray that the tax deeds be decreed null and void, and held for naught. This is equivalent to a prayer for cancellation."); *see also Kupka*, 50 Wn.2d at 466 (reversing and ordering judgment for owner of property who had brought an action to quiet title against holder of a tax deed, noting "In effect, it is an action to set aside a tax deed issued by the treasurer of Kitsap county to the defendants."). U.S. Bank is happy to amend its pleading to include cancellation and/or setting aside of the tax deed at issue, should the Court deem it proper.

Newbegin, 27 Wn.2d 451, 455, 178 P.2d 742 (1947) ("[Respondent] urges that tax titles should take free from any of the owner's equitable rights. That might seem highly desirable from the purchaser's point of view. However that may be, the rule of caveat emptor applies to a purchaser at a tax sale." citing *Shelton v. Klickitat Cnty.*, 152 Wash. 193, 277 P. 839 (1929)); *see also Brower v. Wells*, 103 Wn.2d 96, 108, 690 P.2d 1144 (1984) ("A purchaser at a tax sale takes without warranties, gambling on the validity of title purchased for a nominal price with expectations of large profits.").

F. CV Joint Ventures' Factual Distinctions are Misguided

CV Joint Ventures spends liberal time attempting to factually distinguish each case cited by U.S. Bank. However, such efforts only waste judicial resources. U.S. Bank readily admits that there is no case exactly factually identical to this one. No two cases are exactly the same. However, as is common in the practice of law, the authority relied upon by U.S. Bank, provides relevant and valuable precedent to aspects of U.S. Bank's analysis. Several of the cases cited by U.S. Bank have particularly similar or analogous facts to those at hand. U.S. Bank believes that *Smith* and *Berry* are particularly instructive regarding the ability for the courts to intervene in equity because U.S. Bank paid taxes on the house at issue. *Glepco* is particularly helpful to support reformation of the deeds at issue.

U.S. Bank cannot address every minute distinction that CV Joint Ventures identifies, in large part because many of said distinctions are misguided, deceptive, or pointless.

For example, CV Joint Ventures confusingly attacks *McGuinness v. Hargiss*, claiming that U.S. Bank referenced it in support of an assertion "that somehow CR 12(b)(6) would not apply in a quiet title action." Resp't Br. 5. U.S. Bank made no such assertion, nor did it cite *McGuinness* as support therefor. CV Joint Ventures presents a multi-pronged attack on *McGuinness*, including attacking *McGuinness*' age. *Id.* CV Joint Ventures however, completely overlooks the fact that U.S. Bank cited *McGuinness* only because *Kobza v. Tripp* quotes *McGuinness* verbatim when describing a quiet title claim generally.

> An action to quiet title is equitable and designed to resolve competing claims of ownership. In Washington, such actions are governed by RCW 7.28.010. An action to quiet title allows a person in peaceable possession or claiming the right to possession of real property to compel others who assert a hostile right or claim to come forward and assert their right or claim and submit it to judicial determination. Even if the claim asserted (here the absence of an easement) is absolutely invalid, the parties are still entitled to a decree saying so.") Another and more colorful way of stating the same proposition is that "the object of the statute is to authorize proceedings for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual[.]"

Kobza, 105 Wn. App. at 95 (quoting *McGuinness v. Hargiss*, 56 Wash. 162, 164, 105 P. 233 (1909), *overruled on other grounds by Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994)). Ironically, CV Joint Ventures never addresses *Kobza* in its brief.

CV Joint Ventures also dismisses foreign authority based on recitation of factual distinctions,[12] and categorically dismisses any guidance from Supreme Court cases involving improvements built on the wrong lot (a similar fact to this case), including *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010), and *Peoples Sav. Bank v. Bufford*, 90 Wash. 204, 155 P. 1068 (1916), because both involve equity, and CV Joint Ventures stubbornly argues "that the court cannot invoke equity." Resp't Br. 27.

It is impossible to address CV Joint Ventures' tedious recitation of insignificant factual distinctions. Instead, U.S. Bank respectfully asks the Court to consider and apply reasoning from the abundant relevant and analogous authority that exists.

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[12] Respondent does distinguish *Buk Lhu v. Dignoti*, 431 Mass. 292, 727 N.E.2d 73 (2000), on the legal basis that a Massachusetts tax deed extinguishes the interests of any party claiming rights through the record owner, whereas under Washington law a tax deed also extinguishes interests not of record such as adverse possession. This legal distinction, however, is meaningless in this case since a tax deed takes no effect where taxes have been paid, such as here.

IV. CONCLUSION

CV Joint Ventures' arguments are entirely convoluted—it dismisses *Smith* and *Berry* as support for reformation because they did not involve claims for reformation, but rather challenges to tax deeds where taxes were paid (the entire point of U.S. Bank's citations to the same). Resp't Br. 23. CV Joint Ventures dismisses *Glepco* because it "was not a tax foreclosure situation," but rather involved reformation of a deed of trust (also ironically, the entire point of U.S. Bank's citations thereto). Resp't Br. 7. What CV Joint Ventures misses through its entire brief, however, is that per *Smith*, *Berry*, and supported by essentially all authority cited by both parties in this case, CV Joint Ventures' tax deed cannot convey the U.S. Bank House because U.S. Bank paid the taxes on it. Reformation is the naturally resulting remedy per *Glepco* and other authority. CV Joint Ventures failed to support its position with any substantive authority because its position is directly contrary to firmly established law and would appear to result in the first case in Washington history recognizing the conveyance of property for which taxes were paid to a purchaser at a tax foreclosure sale.

Accordingly, U.S. Bank respectfully requests that the Court reverse (1) the trial court's order of June 05, 2015, granting CV Joint Ventures' motion to dismiss; (2) the trial court's order of July 2, 2015,

awarding CV Joint Ventures attorney's fees and costs; (3) the trial court's order of July 2, 2015 releasing Lis Pendens; and (4) the trial court's denial of U.S. Bank's motion for reconsideration of dismissal of CV Joint Ventures.

Respectfully submitted this 29th day of January, 2016

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V. CERTIFICATE OF SERVICE

I certify that on the 29th day of January, 2016, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following in the manner indicated below:

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431 Mass. 292
Supreme Judicial Court of Massachusetts,
Suffolk.

Buk Lhu v. Dignoti
Supreme Judicial Court of Massachusetts, Suffolk. April 21, 2000 431 Mass. 292 727 N.E.2d 73 *(Approx. 7 pages)*

Leo BUK LHU, trustee,[1]

v.

Salvatore J. DIGNOTI & others,[2] trustees.[3]

Argued Feb. 8, 2000.
Decided April 21, 2000.

Owner of lot brought suit against abutting owner to remove alleged encroachment and for monetary damages. Abutting owner counterclaimed to reform deeds based on mutual mistaken as result of surveyor's error in metes and bounds description at time lots were subdivided. On motions for summary judgment, the Superior Court Department, Suffolk County, Barbara J. Rouse, J., entered summary judgment for abutting owner for reformation of deeds. Lot owner appealed. The Supreme Judicial Court granted application for direct appellate review. The Supreme Judicial Court, Cowin, J., held that: (1) lot owner was not bona fide purchaser for value against whom deed could not be reformed, and (2) lot owner's possession of tax deed did not prevent action for equitable reformation to correct error in tax deed resulting from mutual mistake.

Affirmed.

West Headnotes (7)

Attorneys and Law Firms

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Linda A. O'Connell, Andover, for the defendants.

Present: MARSHALL, C.J., ABRAMS, LYNCH, GREANEY, IRELAND, SPINA, & COWIN, JJ.

Opinion

COWIN, J.

The plaintiff, Leo Buk Lhu (Buk Lhu), trustee of the Barnacle Marina Realty Trust (Barnacle), and the defendants, Salvatore J. Dignoti, Richard L. Kanter and Frederic S. Clayton, trustees of the Wharf Nominee Trust (Wharf), are abutting landowners. Barnacle, claiming that Wharf had encroached 252 square feet onto its property, commenced an action in Superior *293 Court seeking an injunction to remove the encroachment and requesting monetary damages. Wharf counterclaimed for equitable reformation of both parties' deeds based on a mutual mistake as a result of a surveyor's measuring error. A Superior Court judge allowed Wharf's motion for summary judgment for a reformation of the deeds. We granted Barnacle's application for direct appellate review and affirm the Superior Court judgment.

We summarize the essential undisputed facts in the summary judgment affidavits and accompanying material. See *Longval v. Commissioner of Correction*, 404 Mass. 325, 327, 535 N.E.2d 588 (1989). We include as well facts conceded by Barnacle at oral argument. The two pieces of property at issue are located on Atlantic Avenue in Boston (city). Originally, the land was owned as a single parcel by the Blue Water Trust (Blue Water). On May 8, 1984, Whitman & Howard, Inc. (Whitman & Howard), prepared a plan of this area (plan) that subdivided the property into two lots, known as Lots 2 and 3. The plan showed a

wood building on Lot 3, which housed a restaurant, and a marina and water on Lot 2. As Barnacle conceded at oral argument, at the time of the subdivision, the parties to the original deeds intended that Lot 2 contain only the marina and the water and that Lot 3 contain only the building. The plan also contained measurements of the property, and some of the measurements, unbeknownst to Blue Water and Whitman & Howard, were incorrect due to a surveyor's measuring error. (It is this error that is at the center of this case.) A surveyor's report, prepared by Whitman & Howard at the same time, stated that no encroachment or overhanging projections existed on Lots 2 and 3.

Following this subdivision, on June 22, 1984, Blue Water conveyed Lot 2 to the Marina Nominee Trust (Marina) and Lot 3 to Wharf.[4] The deeds to Lots 2 and 3 ***75** referred to the plan and, as a result of the incorrect measurement on the plan, contained an incorrect metes and bounds description. On October 6, 1986, the city took Lot 2 subject to any rights of redemption because Marina had failed to pay property taxes. These rights of redemption were foreclosed on July 9, 1992.

Philip Y. DeNormandie purchased Lot 2 from the city on March 29, 1995, and received a tax collector's deed pursuant to ***294** G.L. c. 60, § 64.[5] On April 4, 1995, David Pogorelc, then trustee of Barnacle, purchased Lot 2 from DeNormandie. Pogorelc transferred his beneficial interest in Barnacle to Buk Lhu in July, 1997.[6] A survey of Lot 2, in October, 1997, revealed that a portion of the building on Lot 3, which housed the Boston Sail Loft Restaurant, encroached on Lot 2. Until Barnacle had Lot 2 surveyed in 1997, it had never asserted any ownership interest in any part of Lot 3.

A Superior Court judge ruled that the deeds held by Barnacle and Wharf must be reformed to reflect the original intent, at the time of the subdivision, that Lot 2 contain only the marina and water and Lot 3 contain the building. On appeal, Barnacle contends that summary judgment was inappropriate because (1) there are disputed issues of material fact whether Barnacle is a bona fide purchaser for value without notice (bona fide purchaser); and (2) the tax title purchased by Barnacle's predecessor in title for Lot 2 is an absolute title that prevents a claim for equitable reformation.

1 1. *Bona fide purchaser.* It is well established that legal instruments, including deeds, may be reformed on the ground of mutual mistake. *Mickelson v. Barnet,* 390 Mass. 786, 791, 460 N.E.2d 566 (1984), and cases cited. *Reder v. Kuss,* 351 Mass. 15, 17, 217 N.E.2d 904 (1966). *Raymond v. Jackson,* 297 Mass. 509, 512, 9 N.E.2d 409 (1937). The original deeds conveyed to Marina and Wharf contained a mutual mistake resulting in an error. The metes and bounds description in the deeds did not reflect the intent of the parties to place the building on Lot 3 and the marina and water on Lot 2.

2 However, a deed may not be reformed against a bona fide purchaser on the ground of a mutual mistake. *Burke v. McLaughlin,* 246 Mass. 533, 538, 141 N.E. 601 (1923), and cases cited. Barnacle argues that the burden of showing that it is not a bona fide purchaser of Lot 2 rests with Wharf and that Wharf has not met this burden. Barnacle, however, misconstrues its burden at the ***295** summary judgment stage of the proceedings.[7] At summary judgment, Wharf, as the moving party, was required affirmatively to demonstrate that there was no genuine issue of material fact concerning Barnacle's status as a bona fide purchaser.[8] *Pederson v. Time, Inc.,* 404 Mass. 14, 17, 532 N.E.2d 1211 (1989). Once Wharf made that showing, in order to defeat summary judgment, Barnacle was required to respond by alleging specific facts that would establish the existence of a genuine issue of material fact regarding Barnacle's bona fide purchaser status. *Id.*

3 Wharf demonstrated ample facts to show that Barnacle was not a bona fide purchaser. Barnacle's conduct before and after the purchase indicates that it had actual notice that the building was located ***76** entirely on Lot 3 and did not intend to purchase any part of that building. Just prior to purchasing the property, Barnacle's trustee attended an "open house" to view Lot 2. At that time, he reviewed the lot and examined the proposal prepared by the city describing the lot as containing a marina and consisting entirely of "water area" and "no upland area." The proposal made no reference to the building as a part of the Lot 2 property.[9] After purchasing the property, Barnacle purchased insurance for Lot 2 and never indicated to the insurer that the property contained a building. Finally, from 1995 when Barnacle purchased Lot 2 until the survey of the property in October of 1997, Barnacle never challenged Wharf's assertion of ownership of the entire building.

In response to Wharf's showing, Barnacle failed to allege any specific facts creating the need for trial. Barnacle merely recites facts surrounding the transfer of Lot 2 from the city to DeNormandie to Barnacle. It does not allege any specific facts creating a genuine issue of

material fact whether it had actual notice of Wharf's claim of ownership over the disputed property. Thus, the Superior Court judge properly determined that no genuine issue of material fact existed regarding Barnacle's bona fide purchaser status. Given these facts, established for purposes of *296 summary judgment, Barnacle was not a bona fide purchaser. Barnacle purchased the deed to Lot 2 with knowledge that the entire building was located on Lot 3 and never intended to purchase any more than the water and the marina located on Lot 2.

4 2. *Tax deed.* Barnacle argues that, regardless of its status as a bona fide purchaser, it is entitled to ownership of the disputed property because it possesses absolute title through a tax deed to Lot 2. We disagree. Barnacle's possession of a tax deed does not prevent an action for equitable reformation to correct an error in the tax deed resulting from a mutual mistake.

5 6 7 Barnacle relies on G.L. c. 60, § 64, which provides that the title conveyed by a tax deed is "absolute after foreclosure of the right of redemption by decree of the land court." The absolute title conveyed under § 64, however, extinguishes only the interests of any party claiming rights "through the record owner, such as 'mortgagees, lienors, [or] attaching creditors.' " *Sandwich v. Quirk*, 409 Mass. 380, 384, 566 N.E.2d 614 (1991), quoting G.L. c. 60, § 66. The purpose of absolute title under § 64 is to clear the new title of all encumbrances placed on the property by the prior record owner. *Sandwich v. Quirk, supra; Crocker-McElwain Co. v. Assessors of Holyoke*, 296 Mass. 338, 349, 5 N.E.2d 558 (1937). Wharf's claim of ownership does not arise from an encumbrance placed on Lot 2 by a prior record owner. Rather, Wharf makes an independent claim of ownership through its own deed. Thus, § 64 does not bar a claim for equitable reformation of a tax deed because of a mutual mistake.

Our conclusion that possession of a tax deed does not prevent an action for an equitable remedy to correct a mutual mistake is consistent with cases from other jurisdictions. In *Riggle v. Skill*, 7 N.J. 268, 81 A.2d 364 (1951), the Supreme Court of New Jersey upheld a decision permitting the reformation of a tax deed because of a mutual mistake by the municipality and the defendant, the purchaser of the tax deed. *Id.* The plaintiffs bought two lots which they thought contained a house. *Riggle v. Skill*, 9 N.J.Super. 372, 375, 74 A.2d 424 (1950). The defendant purchased a tax deed to the lot abutting the plaintiffs' property which mistakenly contained the plaintiffs' house. *Id.* at 376-377, 74 A.2d 424. The court held that the municipality did not mean to convey and **77 the defendant did not mean to purchase the land containing the plaintiffs' house. *Id.* at 381, 74 A.2d 424. The court held that in these circumstances it was proper to reform the tax deed to reflect the parties' intentions *297 so that the plaintiffs did not suffer hardship because of the error in the defendant's tax deed. *Id.*

The Supreme Court of Florida, in *Crompton v. Kirkland*, 157 Fla. 89, 24 So.2d 902 (1946), reached a similar conclusion. The plaintiff, a party not involved in a tax sale, brought suit to enjoin the holder of a tax deed from seeking to eject him from disputed property and to reform the tax deed. The description of the land in the tax deed included land owned by the plaintiff. *Id.* at 93, 24 So.2d 902. The plaintiff alleged in his complaint that, while the tax deed on its face included the disputed land, it was an erroneous description and it was common knowledge to abutting landowners and the taxing authority that he and his predecessors in interest had ownership of part of the described land. *Id.* at 91-92, 24 So.2d 902. The court held that it was proper for the plaintiff to seek reformation of the tax deed to correct the erroneous description of land. *Id.* at 94-95, 24 So.2d 902. The court recognized that when a party claims an interest in land based on his own title and the description in his title conflicts with the terms of a tax deed, an equitable claim for the reformation of the tax deed is an appropriate remedy. *Id.*

In a similar situation, the Supreme Court of Michigan, in *McCreary v. Shields*, 333 Mich. 290, 52 N.W.2d 853 (1952), held that an equitable remedy was appropriate to correct an error arising from a tax deed. One of the plaintiffs had purchased a lot, called Lot K, pursuant to a deed that mistakenly described the adjacent vacant lot, called Lot L. *Id.* at 291, 52 N.W.2d 853. Because of the error in the deed, the plaintiff mistakenly paid taxes on Lot L rather than Lot K. *Id.* at 292, 52 N.W.2d 853. As a result of the unpaid taxes on Lot K, the State received title to Lot K through delinquency proceedings and it conveyed the property to the defendant. *Id.* The State believed it was selling, and the defendant believed she was purchasing, Lot L. *Id.* at 293, 52 N.W.2d 853. The court stated that in these circumstances the defendant "has no just ground for complaint that she is not allowed to unjustly enrich herself out of the error common to all three parties." *Id.* at 294, 52 N.W.2d 853. Thus, the court concluded that a

constructive trust requiring the defendant to convey Lot K to the plaintiffs and requiring the plaintiffs to reimburse the defendant for her purchase price of the disputed lot was the proper remedy. *Id.* at 296, 52 N.W.2d 853. [10]

These cases accord with our view that the conveyance of a ***298** tax title does not preclude an equitable remedy to prevent a party from being unfairly deprived of its land. We conclude that in the circumstances of this case reforming the deeds is a proper remedy. It is apparent that Barnacle, the city, and Wharf all believed that Wharf owned the disputed area. Refusing to reform the tax deed deprives Wharf of property that all parties believed Wharf owned since it purchased Lot 3 in 1984 and would allow Barnacle "to reap the harvest of a bargain [it] never intended to make." ***78** *Burke v. McLaughlin*, 246 Mass. 533, 540-541, 141 N.E. 601 (1923).

Judgment affirmed.

All Citations

431 Mass. 292, 727 N.E.2d 73

Footnotes

1 Of the Barnacle Marina Realty Trust.

2 Richard L. Kanter and Frederic S. Clayton.

3 Of the Wharf Nominee Trust.

4 Richard L. Kanter, Frederic S. Clayton, and Salvatore J. Dignoti were the trustees for both Marina and Wharf.

5 Section 64 provides, in relevant part, that "[t]he title conveyed by a tax collector's deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption...."

6 Pogorelc was both trustee and beneficiary of Barnacle. He sold his beneficial interest to Lhu and then resigned as trustee. Lhu was then appointed trustee.

7 Barnacle argues that it had no burden whatsoever to allege facts regarding its bona fide purchaser status.

8 At trial Wharf would have the burden of showing that Barnacle is not a bona fide purchaser. *Richardson v. Lee Realty Corp.*, 364 Mass. 632, 634, 307 N.E.2d 570 (1974).

9 The only reference to Lot 3 in the proposal is that a steel ramp and walkway on Lot 3 provide access to a timber platform on Lot 2. The only reference to the building is that the Boston Sail Loft is "immediately adjacent to the subject property...."

10 Barnacle erroneously relies on *Picerne v. Sylvestre*, 113 R.I. 598, 324 A.2d 617 (1974). There the Supreme Court of Rhode Island described a tax deed as "an independent grant from the sovereign which bars or extinguishes all former titles, interests and liens not specifically excepted." *Id.* at 600, 324 A.2d 617. Barnacle argues that this broad language indicates that possession of a tax deed extinguishes all possible claims, including the claims of adjacent property owners. However, the language used refers only to those claims that arise from the chain of title of the property subject to the tax deed. The language does not refer to claims arising from the independent chain of title of adjacent property owners. Thus, the *Picerne* case does not provide any guidance regarding whether a tax deed extinguishes a claim of an adjacent property owner for reformation because of mutual mistake.